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No. 04-1461

In The
Supreme Court of the United States

JOSEPH RAYMOND HANAS,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari
To The Court Of Appeals, State Of Michigan

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(a) of this Court's rules, American Jewish Congress, by its attorneys, moves this Court for an order permitting it to file the attached brief *amicus curiae* in support of the Petition for Certiorari. Petitioner consented to the filing of the brief. Respondent refused to give its consent.

The American Jewish Congress has participated in most of this Court's litigation involving the religion clauses of the First Amendment, most recently as counsel in *Cutler v. Wilkinson*. The attached brief calls the Court's

attention to legal authorities in addition to those cited in the Petition for Certiorari.

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INTEREST OF THE *AMICUS*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic, and religious rights of American Jews. While Jews, like many Americans, have divided views on the exact boundary between church and state, they are united in believing that government may not coerce any citizen to participate in a religious exercise. This Court's cases treat that proposition as a bedrock constitutional principle. Because Michigan has blatantly violated it, this Court should grant *certiorari*.

REASONS FOR GRANTING THE WRIT[1]

Whatever their individual views on the precise scope of the Establishment Clause, no member of this Court, let alone a majority of them, has suggested that the Constitution permits government to coerce participation in a religious program at the pain of incarceration. On the contrary, all of the Justices who have expressed views on the subject have held such direct coercion wholly outside the authority of government. The Michigan courts nevertheless upheld precisely such coercion without offering any explanation for their departure from well-settled law.

I. THE COURT HAS UNWAVERINGLY INSISTED THAT GOVERNMENT MAY NOT COERCE PARTICIPATION IN RELIGION

We begin with the opinions of Justices who believe that the Court has read the Establishment Clause too broadly to improperly restrict state decisions regarding religion. We do so not because their views state the outer boundaries of the law, but because even on their narrower view of the Clause, Michigan's treatment of Hanas violates its core values.

In *Lee v. Weisman*, 505 U.S. 577, 644 (1992), Justice Scalia, for himself and three other Justices, asserted that "the coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy ... by force of

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[1] No person or entity other than the *amicus* participated in the preparation of this brief, or paid for the costs of its preparation.

law and threat of penalty" (emphasis in original), and not merely coercive peer pressure. See also *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, ___ (2004) (Rehnquist, J., dissenting); *id.* at ___ (O'Connor, J., dissenting) and *id.* at ___ (Thomas, J., dissenting); *Cutter v. Wilkinson*, ___ U.S. ___, ___ (2005) (Thomas, J., concurring).

Likewise, in *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting), see also, *id.* at 664-65, the dissenters insisted that coercion was an essential element of any Establishment Clause claim. See also *School District of Abington Twshp. v. Schempp*, 374 U.S. 203, 316 (1963) (Stewart, J., dissenting) ("in the absence of coercion" to participate in school prayer, such prayers are constitutional).[2]

Enforced participation in a religious program of drug rehabilitation is the price Hanas was compelled to pay to avoid a criminal record and actual incarceration. This is undoubtedly coercion "by force of law and threat of

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[2] Judge (Professor) Michael W. McConnell, a critic of much existing Establishment Clause law, has written two law review articles underscoring the importance of non-coercion as a core principle of the Establishment Clause: M.W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L.REV. 2105, 2136-44 (2003) ("Establishment at the Founding"); M.W. McConnell, Coercion: The Lost Element of Establishment, 27 WM. & MARY L.REV. 933 (1985-86).

penalty."[3] To use Justice Kennedy's alternative formulation, the order of the drug court judge to Hanas, a Catholic, to attend a Pentecostalist rehabilitation residence program or be incarcerated, is a textbook case of governmental power being deployed to "further the interest of religion through the coercive power of government."

It is not just those Justices who read the Establishment Clause more narrowly than the Court who have pointed to coercion as a hallmark of an established religion. In *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), this Court observed, in its first full modern exposition of the Establishment Clause, that pursuant to the Clause, government can neither "force nor influence a person to go to or to remain away from church against his will ...."

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[3] Hanas was not jailed conditionally so that he would in the future comply with a court order, but unconditionally as punishment for completed violations of Michigan's criminal law. His incarceration was purely penal in nature, and, hence, literally a penalty. *Cf. Hicks v. Fesock*, 485 U.S. 624 (1989) (distinguishing between civil and criminal contempt). Hanas could avoid incarceration only by submitting—under a judge's order—to residence in a diversion program in which he was compelled to participate in a program of religious indoctrination. It should not matter that if Hanas had adequate financial resources, he could have participated in a secular program. His right to be free of imprisonment because of his religious views cannot be dependent on his lack of financial resources. *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971).

Notwithstanding this long-ago enunciated principle, Hanas was forced to attend a Pentecostalist religious program and stay away from his own Catholic church and its clergy, under the direct authority of the drug court. [Petition for Certiorari at 5-6.]

At least two decisions of this Court have found full-blown Establishment Clause violations where coercion (as defined in those cases) existed, even as those decisions leave untouched the settled rule that coercion is a sufficient, but not necessary, prerequisite to an establishment of religion. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

In *Lee v. Weisman*, *supra*, 505 U.S. at 599, this Court held students could not be compelled to listen to a non-sectarian graduation prayer: "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise." This is because (*id.* at 587), "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in a way which establishes a [state] religion ...." *Cf. Torcaso v. Watkins*, 367 U.S. 488 (1961) (invalidating statute requiring a belief in God as a condition for holding public office).

In *Santa Fe ISD v. Doe*, 530 U.S. 290, 312 (2000), involving student-led prayer at high school athletic events, a majority of this Court held that because the practice forced students to choose between attending games and their religious liberty, "[t]he Constitution demands [that school officials] may not force this difficult choice upon these students, 'for ... [i]t is a tenet of the First Amendment that

the States cannot require its citizens to forfeit their rights and benefits as the price of resisting conformance to state-sponsored religious practice,'" citing *Lee*, *supra*. The dissenters did not question the existence of a constitutional ban on coercion. They simply denied coercion was present on those facts.

If voluntary attendance at graduation or a school ball game—where there is no official penalty for non-participation—is coercive, surely compulsion to attend a religious drug rehabilitation program under the threat of incarceration and a criminal record is coercive.

In *Santa Fe*, *Lee*, and other cases, Justices of this Court have disagreed over whether coercion is a necessary and indispensable element of an Establishment Clause claim. *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 602-03 (plurality); *id.* at 627-28 (O'Connor); *id.* at 650, n. 6 (Steven, J.); *id.* at 661 (Kennedy, J.); and whether indirect forms of coercion such as peer pressure are unconstitutionally coercive (compare the opinion of Justice Kennedy in *Lee v. Weisman*, *supra,* 505 U.S. at 592-93 (opinion of the Court); *id.* at 620-21 (Souter, J.), with the dissent of Justice Scalia, *id.* at 632, 639). No Justice, however, has ever denied that sending people to jail for refusing to accept unwelcome religious preachments was a denial of Establishment Clause rights. As Judge McConnell has observed, compelled participation in religious exercises was one of the hallmarks of colonial era establishments at which the Establishment Clause was targeted, Establishment at the Founding, *supra*, n. 2, 44 WM. & MARY L.REV. at 2143.

Petitioners have comprehensively canvassed the decisions of the lower courts applying these principles to compelled attendance at religiously-based alcohol and narcotics programs. [Petition at 11-15.] They demonstrate that most, but not all, courts correctly apply these principles to ban coerced attendance or participation in religiously-based alcohol or drug rehabilitation programs.[4] See Petition at 12-18. There is no need to repeat that discussion. Resolving that dispute is sufficient grounds for review here.

The U.S. Court of Appeals for the Seventh Circuit has treated as beyond question the proposition that state officials may not coerce a potential parolee to reside at a religious-based halfway house,

> [b]ecause the Supreme Court will not allow a public agency to force religion on people even if [an] agency honestly and indeed correctly believes that it is the best way of achieving a secular end that is within government's authority to promote ... [ ]; the state may not require offenders to enroll in [a religious halfway house] even if it is the best halfway house for any or even all offenders.

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[4] This case does not present any question about compelled attendance at a purely secular program under religious auspices. The program Hanas was compelled to attend was thoroughly religious in content and operation.

Freedom From Religion Foundation v. McCollum, 324 F.3d 880, 882 (7th Cir. 2003). The Michigan courts, for reasons they chose not explain were oblivious to what was obvious to the Seventh Circuit.

II. CONGRESS AND THE EXECUTIVE BRANCH HAVE UNIFORMLY INSISTED ON THE NON-COERCION PRINCIPLE

A. Congress

Congress, too, understands that as a matter of constitutional first principles it may not coerce unwilling citizens to participate in social service programs in which religion is an essential element. In allowing more federal funding to flow to "faith-based" programs on equal terms with secular programs, and in departing from the "no-aid" rule of cases such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Congress nevertheless insisted that no person be coerced to participate in religious activities or programs.

In the very first of these statutes, the Temporary Assistance to Needy Families Act (TANF), 42 U.S.C. § 604a(c), Congress provided that government could not deny participation to a grantee because it was faith-based. It also prescribed, contrary to then-settled administrative practice, that it would not require faith-based organizations to strip themselves of religious elements and control to be eligible for government contracts and grants. However, the opening to religious participation was carefully limited. Among the restrictions Congress imposed was the requirement that no one could be coerced to attend a faith-based provider program:

> (1) If an individual ... has an objection to the religious character of the organization or institution from which the individual receives, or would receive, services funded under any program described in ... this section, the State in which the individual resides shall provide to such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection, with assistance from an alternate provider that is accessible to the individual and the value of which is not less than the value of the assistance to which the individual would have received from such organization.

Similar language appears in the Mental Health Block Grant, 42 U.S.C. § 3000x-65(e)(1)(A). In one respect, that statute goes even further than TANF. To ensure that desperate persons were not coerced into accepting religious services by their ignorance of available alternatives, the latter act also required faith-based agencies receiving such funds to notify beneficiaries that they had this right, *id.* at (e)(2). Identical language requiring alternative providers is found in at least one other statute, the Substance Abuse and Mental Health Services Act, 42 U.S.C. § 290kk-1(f)(1).

B. Executive

Eschewing formal legislation, and frustrated by the refusal of Congress to globally legislate faith-based equality in all government programs, President Bush ordered the global implementation of charitable choice. Executive Order

13279 (December 12, 2002). That order has been implemented by a series of departmental regulations which, albeit in different (and possibly insufficient) fashion, also guard against coerced participation in religious activity.

These new regulations provide (a) that no participant can be compelled to participate in a religious exercise; and (b) that any religious exercises which are part of a government funded program must take place separate in time and place from secular portions of the program. See, *e.g.*, 45 C.F.R. § 260.34(c) (OFCCP) ("participation must be voluntary for the beneficiaries of these programs or services"); 45 C.F.R. § 87.2 (Department of Labor) (same); 29 C.F.R. § 2.33(b)(1); 7 C.F.R. § 16.3(b) (Department of Agriculture) (same); 24 C.F.R. § 5.109(c) (HUD) (same); 28 C.F.R. § 38.2(b) (Justice Department) (same); 34 C.F.R. § 75.52(2) (Department of Education) (same); 45 C.F.R. § 260.34(f); 45 C.F.R. § 260.34(g) (Department of Labor) (same); 38 C.F.R. § 61.64(c) (Department of Veterans Affairs) (same); 42 C.F.R. § 54.4 (SAMHSA).

The last cited regulation relates to TANF, which, as noted above (p. 7), requires that a participant objecting to a religious provider be offered an acceptable alternative provider. One commentator on the original draft of these rules urged that they make plain that while participants await an alternative provider they not be penalized in any way. (TANF benefits are conditioned on participants either working or preparing themselves for gainful employment.) While declining to adopt specific language to this effect, the

Department of Labor agreed that a penalty of that sort would be impermissibly coercive:

> [U]nder the TANF Charitable Choice provisions, government may not compel an individual, through loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice. Therefore, the State may not penalize an individual for requesting to receive a service from an alternative provider because he or she objects to the religious character of the organization or institution from which he or she receives or would receive the service.

(68 Fed. Reg. 56,460, September 30, 2003).

Similar comments accompanied promulgation of other of the rules listed above. See, *e.g.*, 69 Fed. Reg. 31,885 (June 8, 2004) (Department of Veterans Affairs); 68 Fed. Reg. 56,431-34 (September 30, 2003) (*id.*, 56,434) ("[i]t is well established that government may not compel an individual through material penalty or advantage to profess a religious belief or to observe an inherently religious practice").

All of this statutory and regulatory authority stems from a clear-eyed recognition of what the courts below blurred: that the ban on coerced participation in a religious activity which lies at the core of the Establishment Clause remains vigorous. This Court should correct the Michigan courts' failure to enforce that principle.

III. THE EXPLOSIVE GROWTH IN DRUG COURTS AND THEIR USE OF COERCIVE MEASURES TO COMPEL DRUG REHABILITATION ADD TO THE IMPORTANCE OF THIS CASE

The importance of this case lies not only in the legal principle implicated. Drug courts, that is, quasi-criminal courts which divert cases involving drug use from the regular criminal justice system, are a nationwide phenomenon of increasing importance. There are at least 1,100 drug courts in operation, and this number is growing rapidly. Drug Courts: A National Phenomenon (National Drug Court Institute, American University 2004) ("National Phenomenon") (available at http://www.dci.org/courtfacts. htm, last visited May 19, 2005). The most recent data shows that over 70,000 Americans pass through these courts every year. Drug Court Activity Update: Summary Information on All Programs and Detailed Information on Adult Drug Courts (OJP Drug Court Clearinghouse and Technical Assistance Project) (2001) at 2.

The success of these courts lies precisely in their ability to coerce persons like Hanas to enter and remain in drug rehabilitation long enough to benefit from the treatment. "A drug court's coercive power is the key to admitting drug-involved offenders into treatment quickly, for a period of time that is long enough to make a difference." National Phenomenon, *supra*, at 3-4.

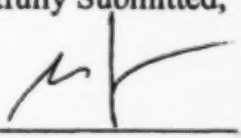
These courts are largely invisible to the appellate courts. The large number of discretionary decisions made (as here) without written opinion make it all the more urgent that this Court decide whether that discretionary authority may be

exercised in what would appear to be a violation of the Constitution.

CONCLUSION

For the reasons stated, a writ of *certiorari* should issue to review the judgment below.

Respectfully Submitted,



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